

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**VIOLET SHRUBSHALL**  
Claimant

VS.

**THE BOEING CO. - WICHITA**  
Respondent

AND

**AETNA CASUALTY & SURETY**  
Insurance Carrier

AND

## WORKERS COMPENSATION FUND

Docket No. 179,626

## ORDER

Both claimant and the Workers Compensation Fund requested review of the Award entered by Administrative Law Judge John D. Clark on November 3, 1994. The Appeals Board heard oral arguments in Wichita, Kansas on May 4, 1995.

## APPEARANCES

The claimant appeared by her attorney, Tom E. Hammond of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Frederick L. Haag of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Cortland Q. Clotfelter of Wichita, Kansas. There were no other appearances.

## RECORD AND STIPULATIONS

The record considered by the Appeals Board and the stipulations of the parties are listed in the Award.

## ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 9 percent whole body functional rating. In addition, the Judge found the Workers Compensation Fund responsible for all of the award. Both claimant and the Fund request review of the finding of nature and extent of disability and, in addition, the Fund requests review of the finding of Fund liability. Those are the issues now before the Appeals Board on this review.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

The Award of the Administrative Law Judge should be modified to reflect the appropriate date of accident and that claimant is entitled to receive permanent partial disability benefits for a 53 percent work disability after leaving work on June 24, 1993.

(1) Claimant alleges she sustained personal injury by accident arising out of and in the course of her employment with respondent during the period of May 1991 through June 30, 1993. The Administrative Law Judge found that the evidence supported that allegation and awarded claimant permanent partial disability benefits for the injury sustained in that accident. Because there was not a stipulation as to the date of accident, this was an issue for the Administrative Law Judge to decide. For purposes of computation of the award, the Judge selected June 30, 1993 as the date of accident; although the claimant did not work after June 24, 1993.

The parties did not question the date of accident the Administrative Law Judge chose to compute the award. However, the Appeals Board must address that issue to render the appropriate award. The record indicates claimant left work on approximately August 6, 1991 to undergo carpal tunnel release surgery and did not return to work until the following October. Because Robert Eyster, M.D., testified that claimant did not sustain additional injury after she returned to work, and that opinion appears uncontroverted, the Appeals Board finds the appropriate date of accident in this claim is the date claimant last worked before her surgery, August 6, 1991. See Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

Claimant started working for the respondent in July 1952 and worked there continuously through June 24, 1993, except for layoffs. In May 1991 claimant reported to Boeing Central Medical with right hand and forearm complaints. At that time claimant was working in the sheet metal department where she was drilling and riveting floor beams. Respondent's Central Medical Department referred claimant to Dr. Eyster, a Wichita orthopedist.

Three months later on August 5, 1991, claimant reported similar symptoms in her left arm, hand, shoulder and wrist. Dr. Eyster then began treatment for those complaints. The doctor performed right carpal tunnel release surgery on August 28, 1991 and released claimant to return to work in October 1991. At that time claimant was restricted to no overhead work, no lifting over 5 pounds, no use of vibratory tools and no repetitive grasping with either hand or arm.

Upon her return to work, respondent placed claimant in an accommodated job in the work pool where she dusted and emptied trash. Claimant remained in a work pool until June 1992 when respondent abolished it. At that time claimant returned to her old shop

as a cleaning station worker where she cleaned and inspected parts. Claimant worked that job until she retired with full retirement benefits in June 1993 when she was 61 years old.

As a cleaning station worker, on an average day claimant would use a rag and solvent to clean and inspect approximately 100 parts per hour, some parts weighing up to 25-30 pounds. Claimant testified that her hands, elbows and shoulders worsened as a result of that job and that she retired because she could not continue to physically perform that job. Before she retired, she advised her supervisor and the personnel department of the physical problems she was experiencing as a result of that job. Also, when she terminated in June 1993, claimant wrote on her termination statement that she completed for the respondent that she was physically unable to continue to work because of her symptoms. Claimant testified that before her symptoms worsened, she had not planned to retire when she did.

Robert Eyster, M.D., a board-certified orthopedic surgeon, testified on behalf of the Workers Compensation Fund. He first saw claimant on July 1, 1991. At that time claimant advised him that she had been having pain in her right hand for approximately a year. His initial examination indicated claimant could not fully extend her thumb and that she had atrophy of the right index finger and weakness in her fingers. Dr. Eyster diagnosed carpal tunnel syndrome and the possibility of ulnar nerve impingement. Shortly after he performed right carpal tunnel release surgery in August 1991, claimant told him she had symptoms in her left arm. Dr. Eyster released claimant to return to work on October 30, 1991 and restricted her to no repetitive gripping or overuse of the hands and no vibrating tools. When he released claimant he also gave her a 5 percent functional impairment rating to the right arm and a 3 percent functional impairment rating to the left arm. Although he does not strictly adhere to the AMA Guides, he uses that book, along with others, to rate patients.

Claimant returned to Dr. Eyster in March, April and May of 1993 with increased complaints of pain in her hands. Although he does not believe claimant sustained any additional permanent functional impairment after her return to work in October 1991, he believes claimant probably should not have been doing the cleaning station job respondent had given her.

Claimant presented the testimony of Ernest R. Schlachter, M.D., who testified that he examined claimant in April of 1993. He diagnosed overuse syndrome of both shoulder girdles and both upper extremities with right carpal tunnel syndrome, previously operated, and psychogenic overlay. He believes claimant has a 3 percent permanent partial functional impairment to each shoulder, a 10 percent functional impairment to the right upper extremity, a 5 percent functional impairment to the left upper extremity, all of which combine to a 14 percent whole body functional impairment rating. He also believes claimant should be on permanent work restrictions and limitations for both hands and arms of no repetitive pushing, pulling, twisting or grasping; no working above the horizontal; and no lifting more than 15 pounds. In formulating his opinions of impairment and permanent work restrictions, Dr. Schlachter excluded the psychogenic overlay.

Respondent presented the testimony of Kenneth D. Zimmerman, M.D., one of respondent's staff physicians. Respondent's medical department saw claimant in May 1991 when she was complaining of right hand and forearm pain, and again on two occasions in July 1991 for similar complaints. On the second visit in July, the medical

department diagnosed right carpal tunnel syndrome and restricted claimant's use of the right hand. On August 5, 1991, claimant reported left upper extremity complaints to respondent's medical department and attributed those symptoms to her increased use of the left arm. Dr. Zimmerman believes claimant has sustained a 10 percent functional impairment to the right arm and shoulder and a 4 percent functional impairment to the left arm and shoulder, making an 8 percent whole body functional impairment. He also believes claimant should be restricted from excessive or repetitive use of either hand.

Only one labor market expert testified, Jerry D. Hardin. Based upon the restrictions of Dr. Eyster and Dr. Schlachter, he believes claimant has lost 45-50 percent and 70-75 percent of her ability to perform work in the open labor market, respectively. He also initially testified claimant lost 70 percent of her ability to earn a comparable wage assuming a preinjury weekly wage of \$732.00 and a postinjury ability to earn \$220.00 per week. However, on cross-examination Mr. Hardin testified the average hourly wage for electrical and electronics equipment assemblers was \$6.98 to \$8.03 and that those jobs were not classified as repetitive work according to the Dictionary of Occupational Titles.

Based upon the above evidence, the Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 9 percent whole body functional impairment rating. After closely reviewing the medical evidence, the Appeals Board adopts the Judge's finding of claimant's functional impairment. However, claimant contends the award should be increased to reflect that claimant has a work disability as of her termination in June 1993. The Appeals Board agrees. Based upon the testimony of claimant and Dr. Eyster, the Appeals Board finds that claimant was physically unable to perform the cleaning station job without violating her permanent restrictions and limitations and that she retired due only to her injury.

Because hers is a "nonscheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 1991 Supp. 44-510e. That statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Because claimant returned to work at a comparable wage after recuperating from her surgery, the presumption of no work disability is applicable through June 24, 1993. However, once claimant terminated her employment because of her worsening condition and respondent failed to offer accommodated employment paying a comparable wage, the presumption of no work disability was overcome and claimant became entitled to permanent partial disability benefits based upon the higher of her work disability or functional impairment commencing June 25, 1993. See Lee v. The Boeing Company - Wichita, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

Based upon the testimony of Mr. Hardin, the Appeals Board finds claimant has lost approximately 45-50 percent of her ability to perform work in the open labor market and approximately 59 percent of her ability to earn a comparable wage. The finding of loss of ability to perform work in the open labor market is based upon Dr. Eyster's restrictions which appear the more appropriate. The finding of loss of ability to earn a comparable wage is based upon comparing claimant's preinjury average weekly wage of \$728.91, as determined by the Administrative Law Judge, with a postinjury ability to earn \$300.00 per week. The Appeals Board considers claimant retains the ability to earn \$300.00 per week based upon the finding that claimant should be able to perform the job of electrical and electronics equipment assembler and earn between \$6.98 and \$8.03 per hour.

Although the Appeals Board is not required to equally weigh the loss of ability to perform work in the open labor market with the loss of ability to earn a comparable wage, there is no compelling reason to give either loss a greater weight under this fact situation and, accordingly, they will be weighed equally. The result is an average between the 45-50 percent loss of ability to perform work in the open labor market and the 59 percent loss of ability to earn a comparable wage, resulting in a 53 percent work disability which the Appeals Board considers to be an appropriate basis for the award in this case.

Based upon the above, claimant is entitled to receive permanent partial disability benefits based upon 9 percent whole body functional impairment rating for the period of August 6, 1991 through June 24, 1993 and after June 24, 1993, claimant is entitled to receive permanent partial disability benefits based upon her 53 percent work disability. Because the parties have not raised the issue of average weekly wage for this review, the Appeals Board will utilize the wage found by the Administrative Law Judge, or \$728.91, without reviewing the Judge's method in making that finding.

(2) The Administrative Law Judge assessed the entire liability for this award to the Workers Compensation Fund. That finding should be affirmed.

Claimant testified she first went to respondent's Central Medical Department for complaints of pain and numbness in her right hand in 1977. At that time the company doctor took claimant off work for one week and referred her to a private physician for treatment of Raynaud's disease. Claimant has experienced pain and numbness in her hands since the 1970s.

Dr. Schlachter testified that Raynaud's is reflex spasm of the arteries that predisposes an individual to develop an overuse condition in their arms because of the reduced circulation. He believes claimant would not have developed the overuse condition in her right hand if it were not for the preexisting Raynaud's disease and that claimant would not have developed the overuse condition in the left upper extremity but for the prior injury to the right and her attempts to protect that arm.

Dr. Zimmerman testified that respondent's medical records indicate claimant reported to the medical department in 1977 with right arm and hand complaints consistent with an overuse condition, and again in 1978 with complaints of right lateral epicondylitis. He also testified that claimant reported in December 1971 that she had a mild arthritic condition in her hands and that her personal physician had diagnosed Raynaud's disease. Because of the Raynaud's, Dr. Zimmerman permanently restricted claimant from working in extremely cold areas. He also testified that the disease causes one to be more susceptible to developing an overuse condition. He believes that claimant would not have

developed the right carpal tunnel syndrome were it not for claimant's preexisting Raynaud's and overuse condition. Further, he believes the overuse injury to the left arm occurred because claimant was protecting the right, and that the left arm injury would not have occurred but for the right arm injury and the Raynaud's.

Dr. Eyster was neither asked whether claimant had a preexisting condition which would predispose her to later developing an overuse syndrome, nor whether he believed claimant had Raynaud's before her May 1991 right arm and hand complaints.

Based upon the evidence presented, the Appeals Board finds that the Workers Compensation Fund should be responsible for the entirety of this award. Claimant did have a preexisting impairment caused by Raynaud's disease that was severe enough to constitute a handicap in obtaining or retaining employment. Before May 1991, respondent knew about the condition and placed the appropriate restrictions upon claimant's activities. Based upon the testimony of Dr. Schlachter and Dr. Zimmerman, the overuse condition that claimant developed in both upper extremities would not have occurred if it were not for the preexisting Raynaud's disease. Therefore, the respondent has proved the necessary elements to shift the entire responsibility of this award to the Workers Compensation Fund as provided by K.S.A. 1991 Supp. 44-567.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark entered in this proceeding on November 3, 1994 should be, and hereby is, modified as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Violet Shrubshall, and against the respondent, the Boeing Company - Wichita, and its insurance carrier, Aetna Casualty & Surety, and Workers Compensation Fund, for an accidental injury which occurred August 6, 1991 and based upon an average weekly wage of \$728.91, for 9.0 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$2,601.00, followed by 89.29 weeks at the rate of \$43.74 per week or \$3,905.54 for a 9% impairment of function, followed by 316.71 weeks at the rate of \$257.56 per week or \$81,571.83 for a 53% work disability making a total award of \$88,078.37.

As of February 14, 1996, there is due and owing claimant 9.0 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$2,601.00, followed by 89.29 weeks of permanent partial disability compensation at the rate of \$43.74 per week in the sum of \$3,905.54, followed by 138.00 weeks of permanent partial disability compensation at the rate of \$257.56 per week in the sum of \$35,543.28, for a total of \$42,049.82 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$46,028.55 is to be paid for 178.71 weeks at the rate of \$257.56 per week, until fully paid or further order of the Director.

The remaining orders of the Administrative Law Judge are adopted by the Appeals Board and incorporated herein by reference to the extent they are not inconsistent with the findings and order set forth above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Tom E. Hammond, Wichita, KS  
Frederick L. Haag, Wichita, KS  
Cortland Q. Clotfelter, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director